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IN THE

Supreme Court of the United States

October Term, 1968

No. 461

FRIEDA SUFFIN,

Petitioner,

—versus—

THE PENNSYLVANIA RAILROAD COMPANY, THE PENNSYLVANIA COMPANY and NORFOLK AND WESTERN RAILWAY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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THE PENNSYLVANIA RAILROAD COMPANY, THE PENNSYLVANIA COMPANY and NORFOLK AND WESTERN RAILROAD COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Frieda Suffin, the plaintiff-appellant below, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit. The judgment is dated and was entered June 6, 1968 (App. 8a).

Opinions Below

The opinion of the District Court for the District of Delaware is reported at 276 F. Supp. 549. The opinion of the Third Circuit has not yet been reported (App. 4a).

Jurisdiction

The District Court's jurisdiction was based on diversity of citizenship and jurisdictional amount, 28 USC § 1332. This Court's jurisdiction is based on 28 USC § 1254(1).

Questions Presented

1. Does an Interstate Commerce Commission order under § 20a of the Interstate Commerce Act approving a railroad

carrier's issuance of securities to its parent as being "in the public interest," but which does not purport to adjudge its justness and reasonableness, deprive the District Courts of jurisdiction to award damages to the carrier for the parent's breach of its fiduciary duty in giving inadequate consideration for the securities?

2. Is it not contrary to the requirements of due process under the Fifth Amendment of the Constitution to apply § 20a in such fashion as to deprive the carrier's stockholders of relief when they were not given notice of the hearing of the proposed securities issuance?

Constitutional Provisions and Statutes Involved

The Fifth Amendment of the Constitution and §§ 5(2)(b) and 20a(2) of the Interstate Commerce Act (the "Act") are involved in this case. (App. 1a-3a).

Statement

The Complaint* (App. Below, 3a).

Plaintiff is a shareholder of defendant Norfolk and Western Railway Company ("N&W") and was a shareholder at the times of the wrongs alleged. She brings this action derivatively on behalf of N&W alleging that its controlling parents, defendants The Pennsylvania Railroad Company and its wholly-owned subsidiary, The Pennsylvania Company, breached their fiduciary duties to N&W. (For simplicity, these two defendants will be referred to collectively

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* Citations to the Appendix to this Petition are referred to as "App."; citations to the Appendix in the Court of Appeals are referred to as "App. Below".

as "Pennsylvania".) Pennsylvania owned, at the relevant time, some 2,342,784 shares of N&W's common stock; such holding constituted about one-third of N&W's outstanding shares. Pennsylvania controlled and dominated N&W through this stock ownership and interlocking directors.

By a decision of June 24, 1964 (324 ICC 1), the ICC approved N&W's acquisition of five other railroads through merger, purchase and lease. Among the conditions imposed by the ICC was that Pennsylvania divest itself of its N&W stock within ten years.

On September 22, 1964, before accepting the divestitute condition and while Pennsylvania still controlled and dominated N&W, Pennsylvania entered into an agreement with N&W that is at the heart of this lawsuit. The agreement was not submitted to the ICC for its approval as part of the merger proceedings. Under it, Pennsylvania agreed to sell 300,000 of its N&W shares, in ten annual installments, to N&W itself. In payment, Pennsylvania caused N&W to agree to issue to itself (Pennsylvania) $130 principal amount of N&W's fifteen-year 4⅝% convertible debentures (the "Debentures"). The Debentures are convertible into N&W common stock at the rate of one N&W share per $130 principal amount of the Debentures.* On the date of this transaction, N&W's common stock traded on the New York Stock Exchange at $130 per share.**

The essence of the complaint is that this agreement was wholly one-sided in favor of the fiduciary, Pennsylvania, to

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* In keeping with the divestiture requirement of the ICC, the conversion privilege is exercisable by anyone other than Pennsylvania.

** The range of N&W's stock on September 22, 1964 was 129¼-131¼; it closed at 131¼.

the disadvantage of the cestui que trust, N&W. The fiduciary could not lose. If the price of the stock increased from its then market price of $130 per share, the Debentures (being convertible at the rate of $130 per share) would rise in value and Pennsylvania would obtain the benefit because it could sell the Debentures at a premium reflecting the market advance. If, on the other hand, N&W's stock fell below $130 per share, Pennsylvania would not stand the loss because it could hold the fifteen-year Debentures (which bore the then prevailing rate of interest) and receive the full $130 principal amount at maturity. Such a heads-I-win-tails-you-lose bargain could not—and did not—result from arm's length bargaining between N&W and its controlling fiduciary, Pennsylvania, but was the product of Pennsylvania's domination and control over N&W.* By way of relief, plaintiff seeks damages, on behalf of N&W, from Pennsylvania.**

The Interstate Commerce Act

The relevant sections of the Act are §§ 5(2)(b) and 20a (2). (These sections are set forth in Appendix A, pp. 1a-3a).

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* The Court of Appeals' opinion questions Pennsylvania's control over N&W because the Pennsylvania directors resigned from the N&W board on September 16, 1964, whereas the challenged agreement is dated "as of September 22, 1964". We submit that plaintiff's allegation that Pennsylvania controlled and dominated N&W must be taken as true for the purposes of this Petition. Pennsylvania still owned its one-third stock interest in and controlled N&W as of September 22, 1964. The challenged transaction was formulated and agreed to while Pennsylvania's nominees were still serving on the N&W board (Complaint, App. Below 3a).

** Although the complaint originally also sought injunctive relief, plaintiff abandoned that prayer and announced that she was seeking damages only.

§ 5(2)(b) governs the issuance of securities in mergers. It provides:

> "* * * the Commission shall afford reasonable opportunity for interested parties to be heard. * * * If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be *just and reasonable,* the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the *public interest,* it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with modifications, so found to be *just and reasonable* * * *" (Emphasis added)

Thus, § 5(a)(b) of the Act provides that the issuance of all securities in merger proceedings are pre-conditioned on two ICC findings: (1) the transaction must be "just and reasonable" with respect to the private rights of the security holders; and (2) it must be in the "public interest." To protect the private rights of "interested parties", § 5(2)(b) provides for their right to be heard.

§ 20a(2) of the Act, on the other hand, governs the issuance of securities otherwise than in a merger. It requires that a carrier must obtain ICC approval before it can issue securities. Unlike § 5(2)(b), however, approval under § 20 does not require a finding that the transaction be "just and reasonable". All that is required is that the proposed securities issue be "compatible with the public interest" so that the carrier "will not be impaired [in] its ability to perform" its service to the public. § 20a(2) provides:

> "The commission shall make such order [authorizing a carrier to issue securities] only if it finds that such issue . . .: (a) is for some lawful object within

> its [the carrier's] corporate purposes, and compatible with the *public interest,* which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the *public* as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose." (Emphasis and parenthetical interpolations added).

Since private rights of security holders are not involved under § 20, and since no finding of the fairness and reasonableness of the transaction is required—or even permitted—to be made by the ICC, no provision is made under § 20 giving security holders or other interested parties any right to be heard.

The ICC Decisions

On June 24, 1964, the ICC acting pursuant to § 5 of the Act which governs mergers, approved N&W's acquisition of five other railroads (324 ICC 1).* As previously noted, that decision (the "Merger Decision") required that Pennsylvania divest itself of its N&W stock (324 ICC at 33, 34). But the Merger Decision did not and could not have constituted pre-approval by the ICC of the N&W Debenture issue as just and reasonable; indeed, the Debenture transaction was not even submitted to the Commission during the merger proceedings. On October 16, 1964, Pennsylvania, having agreed to divest itself of N&W stock, the merger between N&W and five other railroads became effective.

On April 13, 1966, almost two years after the Merger Decision, and a year and a half after the N&W merger had

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* *Norfolk and Western Railway Company and New York, Chicago and St. Louis Railway Company—Merger, etc.,* Finance Docket No. 21510.

been consummated, the ICC, acting *pursuant to § 20a of the Act,* which governs the issuance by carriers of securities outside of a merger, approved N&W's application (filed in February 1966) to issue the Debentures to Pennsylvania (The "Securities Decision", 328 ICC 884).*

In approving the transaction the ICC was careful, pursuant to the mandate of § 20, to limit itself to a finding that the deal was in the public interest. The Commission refrained from making any finding that the transaction was just or reasonable, and refrained, too, from affecting or purporting to affect the private rights and the relationships of N&W and its shareholders.

Defendants' Motions

Defendants moved, without answering, to dismiss the action on the ground that §§ 5 and 20 of the Act give exclusive jurisdiction over the subject matter of this litigation to the ICC and that the ICC exercised that jurisdiction by its Merger Decision (324 ICC 1) and Securities Decision (328 ICC 884).

The Decisions Below

The District Court sharply points up the nub of the controversy, thus:

> "Plaintiff further argues that the stockholder's suit is impliedly authorized by the language of the Interstate Commerce Act. She relies upon the difference in language between 49 U.S.C.A. § 5(2) (b) and 49 U.S.C.A. § 20a(2). While conceding that under § 5, the merger provision of the Act, the Interstate

* *Norfolk & Western Railway Company Securities,* Finance Docket No. 24039.

> Commerce Commission has the exclusive authority and obligation to determine whether the terms of the proposed merger are 'just and reasonable' to the private interests affected by the merger, plaintiff points to the lack of any comparable language in § 20a(2), the securities provision of the Act, and from this draws the negative inference that private interests are not and can not be determined in a § 20 proceeding." (276 F. Supp at p. 552)

The Court concludes:

> "Plaintiff's contention places an unwarranted and unnatural strain upon the construction of the Act." (276 F. Supp at p. 553)

In support of its conclusion, the Court establishes this novel interpretation of § 20:

> " . . . the Commission may approve a merger and concurrently authorize a railroad to issue securities.
>
> In (such cases), the plenary and exclusive jurisdiction of the ICC to determine whether the terms of a merger are 'just and reasonable' to the private interests involved is extended to include any securities which are issued appurtenant to a railroad merger." (paranthetical interpolation added; 276 F. Supp at p. 553)

With regard to this last proposition two observations need to be made. First, while the Commission in its 1964 Merger Decision mandated that Pennsylvania divest itself of its stock at N&W, it "did not", as the District Court correctly held, "specifically indicate the manner in which the divestiture was to be effected." (276 F. Supp. at p. 551) The question of whether N&W would turn out to be a buyer of its own stock at all, and if so on what terms, was never

considered, let alone passed upon, by the Commission in its Merger Decision in 1964.

Secondly, even assuming that the Commission might, in the exercise of its administrative discretion, have telescoped and integrated §§ 5 and 20, the fact is that it did *not* do so. For the Commission was at pains to point out that it was considering N&W's issuance of Debentures not under § 5 but under § 20—and under § 20 alone. (328 ICC 884).

Consistent with its explicit statement that it was not concerned with the private rights of N&W vis-a-vis its shareholders, the Commission confined its conclusion to a holding merely that the N&W Debenture issue was not repugnant to the public interest.

Thus the District Court imputed to the Commission the exercise of a jurisdiction which the Commission itself refused to exercise.

The syllogism of the Courts below which implies that the Commission might have approved the N&W debenture issue as fair and reasonable under § 5 involves a totally fallacious premise. The fact that the Commission mandated that Pennsylvania divest itself of its N&W stockholders does not constitute a blank check pre-approval of any transaction, no matter how wicked, that Pennsylvania might perpetrate on the puppet directors of its dominated subsidiary, N&W. The 1964 Merger Decision is satisfied, and is exhausted, by the required divestiture of Pennsylvania. The question of the justness and reasonableness of the Debenture issue is wholly unrelated—except historically—to the divestiture mandate; like all securities issues it falls within § 20.

In any case, the end result of the decisions below is that in the face of a flagrant breach of fiduciary duty the Commission never adjudicated or purported to adjudicate the justness and reasonableness, i.e., the fairness, of the Debenture deal. The Court below likewise never adjudicated the fairness of the deal. Nevertheless, plaintiff is now in the ludicrous posture of being estopped from questioning a non-existent finding.

From a precedental point of view, this interpretation of § 20 subverts a consistent line of autho ty that in securities issues (outside of those approved in mergers) the courts and the courts alone have jurisdiction over the private interests and the private rights of security holders vis-a-vis their corporations.

Since the ICC's authorization under § 20 to issue the N&W debentures did not, and could not, affect the internal or private rights of N&W and its stockholders, no notice was required to be given to interested parties of the impending hearing seeking approval to issue the Debentures as in the public interest. No notice was in fact given. No stockholder of N&W appeared at the hearing. Oblique and uninformative references to the necessity of securing ICC approval, without informing the shareholders of when, where and what for such hearings would be held is, as we shall later argue, a far cry from the notice required by due process.

Plaintiff appealed from the decision of the District Court. The Court of Appeals for the Third Circuit affirmed the dismissal substantially on the basis of the District Court's opinion. The Court of Appeals misread the ICC's Securities Decision. The Court's opinion relies on the "ex-

plicit ICC finding that the exchange 'is in the best interest of tne * * * security holders', 328 ICC at 891" (App. p. 6a). What the ICC said, however, was that the *idea* of an exchange would be beneficial to N&W's shareholders because it would "minimize the impact of [Pennsylvania's] divestiture program on the market price of [N&W's] common stock" (328 ICC 891). The ICC studiously refrained from adjudging the fairness of the particular Debenture issue here involved.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Decision of a Federal Question is in Conflict with Applicable Decisions of this Court.

A. The Court of Appeals Decision Concerning § 20a of the Interstate Commerce Act Conflicts with the Applicable Decisions of this Court.

The decisions in this Court—and elsewhere—have been virtually unanimous that private rights are not and cannot be decided by the ICC when it authorizes a carrier to issue securities solely pursuant to § 20a of the Act.

In *New York Central Sec. Corp.* v. *United States,* 287 U.S. 12, 28-9 (1932), this Court specifically held that minority stockholders seeking relief for a violation of fiduciary duties could not appeal the ICC's ruling pursuant to § 20a because the ICC had no jurisdiction under that section to hear private claims. This Court held that claims concerning breaches of fiduciary duty were cognizable only in the District Courts. This Court cited its prior decision in *Pittsburgh & W. Va. R. Co.* v. *United States,* 281 U.S. 479, 488 (1930). In that case, this Court held specifically that ICC action permitting

the sale of a passenger station in no way foreclosed a stockholder of the railroad from asserting that the sale was for an inadequate price and was, therefore, a violation of the directors' fiduciary duty. Indeed, when a stockholder sought to challenge the railroads' acts before the ICC, he was told by this Court:

> "Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the district court."

In *Otis & Co.* v. *Pennsylvania R. Co.*, 61 F. Supp. 905 (E. D. Pa., 1945), aff'd on opinion below, 155 F. 2d 522 (3rd Cir., 1946), the Third Circuit itself specifically ruled that approval by the ICC pursuant to § 20a to issue securities did not in any way preclude a derivative suit in the District Court for a breach of a fiduciary duty based, precisely, on the issuance of the securities that the ICC had approved pursuant to § 20a. Judge Kolodner in that case held (61 F. Supp. at 909):

> "The Commission, under the statutory authority here involved * * * 49 U.S.C.A. §20a, does not determine private rights."

The Court in *Otis* relied on this Court's decision in the Pitts*burgh* and *New York Central Sec. Corp.* cases as authority; and it cited, too, *Casey* v. *Woodruff*, 49 N. Y. S. 2d 625 (Sup. Ct., N. Y. Co., 1944) in which Judge Shientag held:

> "To hold that the decision of the commission on an application under §20a may be res adjudicata on the question of a director's breach of fiduciary duty would have most unfortunate effects." (49 N.Y.S. 2d at 640).

> "It [the ICC] did not, however, purport to pass upon the personal liability of the directors for alleged breach of fiduciary duty, nor did it have the slightest basis of jurisdiction for the purpose." (49 N.Y.S. 2d at 642).

Against these authorities, defendants have argued that *Denver & Rio Grande W. R. Co.* v. *U. S.*, 387 U.S. 485 (1967) and *Schwabacher* v. *U.S.*, 334 U.S. 182 (198) have, in effect, overruled the *Pittsburgh* and *New York Central Sec. Corp.* cases *sub silentio*. The Courts below agreed. We submit, however, that neither of the cases is applicable and that the *Pittsburgh* and *New York Central Sec. Corp.* cases are still controlling.

Schwabacher was a merger case which was decided pursuant to § 5 (2) (b) of the Act. The ICC was, therefore, specifically charged with the duty of seeing to it that the terms of the merger were "just and reasonable". Hearings were held at which every party was represented. It is acknowledged, of course, that an ICC decision based on a § 5 hearing cannot be collaterally attacked in the District Courts. The Securities Decision at bar (328 ICC 884), however, involved no merger and no adversary hearing; the merger between N&W and five other railroads had already been concluded some year and a half earlier.

The other authority relied on by defendants and the Courts below—the *Denver & Rio Grande* case—involved the "public interest" clause of § 20a. The issue in the *Denver & Rio Grande* case concerned the anti-competitive effect of a proposed securities issuance pursuant to § 20a; this Court held that the ICC must hold a hearing to weigh the anti-trust effect of such an issuance. This Court neither said nor implied that private rights could be decided by the ICC pursuant to § 20a.

We submit, therefore, that neither *Schwabacher* nor *Denver & Rio Grande* overruled or purported to overrule this Court's prior—and controlling—decisions in *Pittsburgh & W. Va. R. Co.* v. *United States,* 281 U. S. 479 (1930) and *New York Central Sec. Corp.* v. *United States,* 287 U. S. 12 (1932). Indeed, in *County of Marin* v. *United States,* 356 U. S. 412 (1958), this Court held that § 5 proceedings are strictly limited to merger transactions. In *Marin,* the ICC assumed § 5 jurisdiction to preside over the terms of separation between two carriers. This Court reversed the ICC's assumption of § 5 jurisdiction because the transaction involved not a merger, but its opposite, a split-up. At bar, the debenture transaction between N&W and Pennsylvania involved, like *Marin,* a separation, not a merger. Therefore, the ICC could not have exercised § 5 jurisdiction over the challenged N&W—Pennsylvania exchange even had it wanted to. *A fortiori,* the ICC's § 20a proceeding cannot be given the *res judicata* effect reserved for § 5 hearings. By holding otherwise, the Courts below rendered a decision that not only conflicts with the Act, conflicts with the applicable decisions of this Court, but conflicts, as we proceed to show, with the due process clause of the Fifth Amendment.

B. The Circuit Court's Decision Conflicts with the Fifth Amendment to the Constitution.

In the face of the destruction of the property rights of the 63,000 shareholders of N&W by the presumed action of the Commission, we argued that there was a lack of due process: the shareholders of N&W would have been entitled

to notice and an opportunity to be heard. The Court of Appeals purports to find such "notice."

> "Although the N&W proxy of March 23, 1966 gave relatively short notice of the pending application to the I.C.C. for approval of the exchange of stock for debentures, the N&W proxy of April 2, 1965, gave the appellant ample notice that a debenture-for-stock purchase agreement was being prepared as part of the divestiture necessary to accomplish the merger. The essential terms and characteristics of the transaction were set forth and an aggrieved shareholder was on notice that such a transaction was to be submitted to the I.C.C. for approval at a future date." (Opinion, App. 7a, fn. 4)

An analysis of these so-called notices establishes a novel precedent in the law of due process.

The "relatively short notice" adverted to by the Court of Appeals consists of an N&W proxy statement (App. Below, p. 19a). It was dated March 23, 1966. As part of a lengthy narrative there appears a statement in passing at page 30 that N&W's application was then pending before the ICC. The decision approving the application as being in the public interest was announced by the ICC on April 13, 1966. This "notice" never informed N&W's shareholders whether their private rights were under consideration by the Commission, whether they had a right to be heard, what the procedures were for the exercise of such rights, in short the conventional things which go into the usual form of notification especially to laymen. Even assuming that a hypothetically sophisticated reader of proxy statements made careful inquiry, he would have learned that the Commission was acting, according to its own declaration, not under § 5

but under § 20; and that, therefore, the issue of fairness and reasonableness of the transaction was not before it.

Altogether, this "notice" to the N&W shareholders was like telling a blind man to look in the dark for a black hat that isn't there.

The other "notice" cited by the Court of Appeals is even further removed from reality (App. Below, p. 16a). That consisted of an N&W proxy statement dated April 2, 1965, a year before N&W filed pursuant to § 20. That merely announced the fact that, at some undetermined future time, N&W planned to issue the Debentures "subject to the approval and authorization" of the ICC. Presumably, the interested shareholders of N&W were required to inquire at regular intervals of the ICC as to whether such application had been filed.

The minimal requirement of administrative due process is that the notice must specify the "time, place and nature of the hearing" (Administrative Procedure Act § 554).

The authorities in this Court and in the courts below are unanimous that administrative agencies are governed by the Due Process Clause of the Fifth (or Fourteenth) Amendment and cannot deprive a person of his rights or property without notice and a hearing. In *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292, 304-305 (1937), this Court held:

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional

restraints. *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 1), *supra,* 294 U. S. p. 70; *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 2), 294 U. S. 79; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" (*St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan* v. *United States,* 298 U. S. 468, 480, 481; *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U. S. 88, *supra.* The right to such a hearing is one of 'the rudiments of fair play' (*Chicago, M. & St. P. Ry. Co.* v. *Polt,* 232 U. S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 1), (No. 2), 294 U. S. 63, *supra; Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 682. Cf. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, *supra.* There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

Accord: *Morgan* v. *United States,* 304 U. S. 1, 19 (1938) (Department of Agriculture); *Standard Airlines* v. *Civil Aeronautics Board,* 177 F. 2d 18, 21 (Dist. Col Cir., 1949); *Salvino* v. *United States,* 119 F. Supp. 277, 284 (W. D. Wash., 1954). (A three-judge court ruled that an ICC order violated due process because it permitted "no opportunity for plaintiff to be heard"); *Takeo Tandano* v. *Manney,* 160 F. 2d 665, (9th Cir., 1947).

To permit such oblique, casual and uninformative references to constitute the legally required notice of the imminent destruction of valuable property rights is to make a mockery of due process, one of the most jealously guarded requirements of the Constitution.

The Importance of the Circuit Court's Decision

The Circuit Court's decision is of great importance for many reasons.

1. The Circuit Court's decision permits fiduciaries, acting pursuant to § 20a of the Act, to deal unfairly with their *cestui que trust* with impunity. Carriers are constantly seeking ICC approval, under § 20a, for the issuance of a great variety of securities for a great variety of purposes. The Circuit Court's opinion—for the first time and in the face of the directly contrary opinions of this Court—grants immunity to directors if the ICC in a non-adversary § 20a proceeding approves the issuance.

2. The most obvious area of importance of the Circuit Court's decision is that it binds parties who had no notice of the "hearing" that compromised their rights. The authorities (cited above) are unanimous in declaring such a procedure to be in violation of the Due Process clause of the Fifth Amendment.

CONCLUSION

For the reasons given, petitioner respectfully prays that the writ be granted.

Respectfully submitted

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APPENDIX A

The Constitutional Provisions and Statutes Involved

The Fifth Amendment to the Constitution

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§5 (2) (b) of the Interstate Commerce Act, 49 U.S.C. §5 (2) (b)

UNIFICATIONS, MERGERS AND ACQUISITIONS OF CONTROL

* * * * *

Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If

the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms, and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

§ 20a(2) of the Interstate Commerce Act, 49 U.S.C. §20a(2) §Securities of carriers; issuance, etc.

* * * * *

Issuance of securities; assumption of obligations; authorization

It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or

indebtedness of the carirer (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose: *Provided,* That nothing in this section is to be construed as applying to securities issued or obligations or liabilities assumed by the United States or any instrumentality thereof, or by the District of Columbia or any instrumentality thereof, or by any State of the United States, or by any political subdivision or municipal corporation of any State, or by any instrumentality of one or more States, political subdivisions thereof, or municipal corporations. As amended July 24, 1965, Pub.L. 89-86, § 1, 79 Stat. 263.

* * * * *

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17106

FRIEDA SUFFIN,

Appellant

v.

THE PENNSYLVANIA RAILROAD COMPANY,
THE PENNSYLVANIA COMPANY AND
NORFOLK AND WESTERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued May 7, 1968
Before HASTIE, *Chief Judge*, and
McLAUGHLIN and VAN DUSEN, *Circuit Judges*

OPINION OF THE COURT
(Filed June 6, 1968)

PER CURIAM

This appeal is from an order of the District Court granting defendants-appellees' motions to dismiss a derivative stockholder suit for lack of jurisdiction. See *Suffin v. Pennsylvania Railroad Company*, 276 F. Supp. 549 (D. Del. 1967), where the background facts and motions are accurately summarized. The appellant brought her derivative suit, seeking damages for breach of fiduciary duty, as related to the exchange, over a ten-year period, of convertible debentures issued by Norfolk and Western Railway Company (N & W) for N & W common stock held by The Penn-

sylvania Company, a wholly-owned subsidiary of The Pennsylvania Railroad Company (together, PRR).

Even though the complaint alleges that PRR dominated and controlled N & W through stock ownership and an interlocking directorship at the time of the initial "memorandum of agreement" setting the terms of the challenged exchange (September 22, 1964), the complaint also concedes that all PRR officers and directors had resigned from the N & W Board by September 16, 1964. The record further shows that on October 13, 1964, PRR had deposited all its shares of N & W in three, I.C.C.-approved, independent voting trusts pursuant to the Interstate Commerce Commission (I.C.C.) "merger" decision of June 24, 1964, which established certain preconditions for a railroad merger, 324 I.C.C. 1, 48-49 (1964). The transaction was approved again by the N & W directors on September 28, 1965 (328 I.C.C. at 885) and the agreement (dated as of December 31, 1965) was submitted for I.C.C. approval on February 28, 1966. The "securities" decision of April 13, 1966, approving the contemplated exchange, 328 I.C.C. 884 (1966), makes specific reference to the earlier merger decision and to its required PRR divestiture of N & W stock, and we note, as did the District Court, that in its "merger" decision the I.C.C. explicitly "retain[ed] jurisdiction for the purpose, among others, of insuring an orderly divestiture within the 10-year period . . . " 324 I.C.C. at 48.[1]

---

[1] The appellant's argument that the "merger" and "securities" decisions should be viewed as "separate and distinct" was rejected by the District Court 276 F. Supp. at 552. A reading of the two Reports of the Commission strongly supports this conclusion and the inter-relationship of this merger and divestiture plan with several other mergers and securities problems before the I.C.C. (see 324 I.C.C. at 16 ff.) suggests that the delay between the two decisions is not support for appellant's argument that the I.C.C. decisions are related only "historically." See *Penn-Central Merger Cases,* 389 U.S. 486, 511-518 (1968).

Appendix B—Opinion of the Court of Appeals

The District Court concluded that the I.C.C. had approved the challenged securities transaction and, in doing so, acted pursuant to statutory authority that allowed, in the particular circumstances of the suit at bar, a determination that the terms of the securities transaction were "just and reasonable"[2] to private interests. Consequently, the District Court decided that the I.C.C., in approving the transaction, had passed on the gravamen of appellant's complaint and that her suit, therefore, constituted a challenge to an I.C.C. determination that had to be brought before a three judge District Court pursuant to 28 U. S. C. §§2321-2325. Accordingly, the motions to dismiss were granted.

Our own examination of the two I.C.C. decisions involved, 324 I.C.C. 1 (1964) and 328 I.C.C. 844 (1966), and particularly our consideration of the detailed discussion of the divestiture required, 324 I.C.C. at 24-28, and the explicit I.C.C. finding that the exchange "is in the best interest of the . . . security holders," 328 I.C.C. at 891, convinces us that the District Court reached the proper result.[3] The

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[2] 49 U. S. C. § 5(2) (b). See *Schwabacher v. United States*, 334 U. S. 182 (1948), where the court used this language at pp. 198-9, in addition to the wording quoted at pp. 553-4 of the District Court opinion:

> "Apart from meeting the test of the public interest, the merger terms, as to stockholders, must be found to be just and reasonable."

See, also, 49 U. S. C. § 20a.

[3] Appellant argues that the debenture-for-stock transaction was not contemplated by the merger decision since the I.C.C. mentioned only a cash purchase by N & W of its own stock. 324 I.C.C. at 41. We reject this argument, and any conclusions drawn therefrom, since the cash purchase discussion was not presented as the sole device for N & W repurchase and the I.C.C. appears to have discussed the impact of a "cash sale" on the N & W because it was the type of repurchase that would have hurt the N & W the most—as contrasted with a multitude of potential deferred payment alternatives. Since a party asserting jurisdiction carries the burden of proof, see *Kaufman v. Liberty Mutual Insurance Company*, 245 F. 2d 918, 920 (3rd Cir. 1957), appellant's interpretation of the I.C.C. report, without more, is a weak foundation for allowing their statutory argument to prevail.

appellant's statutory argument must be rejected in view of the inter-relationship between the above-mentioned I.C.C. "merger" and later "securities" decisions, 276 F. Supp. at 552. The District Court was entirely correct in concluding that *Otis & Co. v. Pennsylvania R. Co.*, 61 F. Supp. 905 (E.D. Pa. 1945), aff'd. 155 F. 2d 522 (3rd Cir. 1946), was inapposite and did not govern this case (276 F. Supp. at 554).[4] We will affirm the order of dismissal for lack of jurisdiction[5] on the basis of the thorough and persuasive opinion of Chief Judge Wright.

---

[4] Our conclusion that the "merger" and "securities" decisions are in fact interrelated obviates any need to discuss at length the appellant's arguments on the statutory nature of an I.C.C. determination if a "securities" decision is related to a merger only "historically" and is subject to I.C.C. review solely under the language of § 20a. Decisions such as *County of Marin v. United States*, 356 U. S. 412 (1958); *Pittsburgh & W. Va. Ry. v. United States*, 281 U. S. 479 (1930); and *N. Y. Central Securities Co. v. United States*, 287 U. S. 12 (1932), are thus inapposite in these circumstances since the question of what the I.C.C. "must" do in a § 20a determination is irrelevant in a situation where it chose to exercise §20a powers in connection with a merger under §5, *Schwabacher v. United States*, *supra*.

There is no doubt that the appellant and her class could have intervened and been heard in the I.C.C. proceedings, e. g., 49 U. S. C. § 73(1), *Southern Railway Company v. United States*, 186 F. Supp. 29, 42 (N. D. Ala. 1960); *Abramson v. Western Maryland Railway Company*, 142 F. Supp. 694, 696 (E. D. Pa. 1956); 49 U. S. C. § 20a(6); *Alleghany Corp. v. Breswick & Co.*, 353 U. S. 151, 175 (1957); see, also, *Oscar Gruss & Son v. United States*, 386 U. S. 776 (1967). Although the N & W proxy of March 23, 1966 gave relatively short notice of the pending application to the I.C.C. for approval of the exchange of stock for debentures, the N & W proxy of April 2, 1965, gave the appellant ample notice that a debenture-for-stock purchase agreement was being prepared as part of the divestiture necessary to accomplish the merger. The essential terms and characteristics of the transaction were set forth and an aggrieved shareholder was on notice that such a transaction was to be submitted to the I.C.C. for approval at a future date.

[5] The submitted order, approved by all counsel, provided for dismissal with prejudice. Although she argues that dismissal "with prejudice" is improper in this case, appellant has advanced no reasons why she should not be deemed to have waived this objection.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,106

BRENDA SUFFIN,

Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
THE PENNSYLVANIA COMPANY and
NORFOLK AND WESTERN RAILWAY COMPANY

(D. C. Civil Action No. 3342)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Present:

HASTIE, Chief Judge, and McLAUGHLIN and VAN DUSEN, Circuit Judges.

Appendix C—Judgment of the Court of Appeals

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed November 29, 1967, be, and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN
Clerk

June 6, 1968

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FILED
OCT 14 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 461

FRIEDA SUFFIN,

Petitioner

versus

THE PENNSYLVANIA RAILROAD COMPANY, PENNSYLVANIA COMPANY and NORFOLK AND WESTERN RAILWAY COMPANY,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS, THE PENNSYLVANIA RAILROAD COMPANY AND PENNSYLVANIA COMPANY, IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 461

FRIEDA SUFFIN,

Petitioner

versus

THE PENNSYLVANIA RAILROAD COMPANY, PENNSYLVANIA COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS, THE PENNSYLVANIA RAILROAD COMPANY AND PENNSYLVANIA COMPANY, IN OPPOSITION

OPINION BELOW

The opinion of the District Court for the District of Delaware is reported at 276 F. Supp. 549. The opinion of the Court of Appeals for the Third Circuit is not yet reported (Pet. App. 4a-7a).[1]

1. The reference "Pet. App." is to the appendix to the petition.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 8a-9a) was entered on June 6, 1968. The petition for a writ of certiorari was filed on August 30, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Does a one-judge district court have jurisdiction, in a stockholder's derivative suit seeking damages for a railroad company, to decide whether the consideration received by the carrier for the issuance of its securities was adequate, when the issuance of the securities has been approved by the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act?

STATUTES INVOLVED

Relevant provisions of Section 5(2) and Section 20a of the Interstate Commerce Act, 49 U.S.C. 5(2) and 20a, as amended, are set forth at Pet. App. 1a-3a.

STATEMENT

The subject matter of this suit is an Exchange Agreement (the agreement) between Norfolk and Western Railway Company (N&W), on the one hand, and The Pennsylvania Railroad Company and its subsidiary, Pennsylvania Company (collectively, Pennsylvania) on the other. It provides that N&W will issue, in a series of transactions extending to 1974, a total of $104,000,000 principal amount of certain debentures in exchange for 800,000 shares of its common stock, a ratio equivalent to $130 of debentures for each such share. Pursuant to Section 20a of the Interstate Commerce Act (the Act), 49 U.S.C. 20a, the Interstate Commerce Commission (ICC or Commission) approved and authorized the issuance by N&W of its debentures to Pennsylvania in accordance with all the terms of the agreement. *Norfolk & Western R. Co. Securities,* 328 ICC 884 (1966) (hereinafter *N&W Securities*).

The suit is derivative in nature seeking on behalf of N&W money damages from Pennsylvania on the grounds that the agreement is unduly favorable to Pennsylvania and that negotiation of the agreement on the terms involved constituted a breach of fiduciary duty on the part of Pennsylvania as the allegedly controlling and dominating stockholder of N&W. Jurisdiction of the district court was invoked on the basis of diversity of citizenship of the parties and the amount in controversy.

The district court granted motions to dismiss the complaint for lack of jurisdiction on the ground that the issues could be reviewed only by a three-judge district court pursuant to provisions of the Judicial Code, 28 U.S.C. 2321-2325. *Suffin v. Pennsylvania Railroad Company,* 276 F. Supp. 549 (D. Del. 1967). The court of appeals affirmed, Pet. App. 4a-9a.

In *Norfolk & Western R. Co. and New York, Chicago & S. L. R. Co.—Merger, etc.*, 324 ICC 1 (1964) (hereinafter *N&W Merger*), the Commission approved certain merger and other unification transactions proposed by N&W, on condition that Pennsylvania agree to divest itself over a 10-year period of its ownership of N&W stock. More than one-third of the ICC Report (324 ICC 32-49) is devoted exclusively to the existing and future relationships between N&W and Pennsylvania, and the conditions for the divestiture were precisely stated (pp. 48-49). Included in the Report is a suggestion that N&W might agree to "annual sales to (it) of shares of its stock over a period of years" (324 ICC 41). The ICC expressly retained continuing jurisdiction over the divestiture for the purpose "among others" of insuring that it proceed in an orderly manner (324 ICC 48).

The complaint alleged, and the petition here repeats, that the agreement involved was made on September 22, 1964 at a time when Pennsylvania owned one-third of N&W's voting stock and had interlocking directors on its Board. The ICC report in *N&W Securities* reveals to the contrary (1) that N&W's Board of Directors had authorized the transaction more than a year after the resignation of interlocking directors, on September 28, 1965 and (2) that the agreement was actually dated as of December 31, 1965, considerably after Pennsylvania had been completely divested of control by its compliance with a Commission requirement that all voting rights in N&W stock owned by Pennsylvania be transferred to "three independent voting trustees" (328 ICC 885).

In reviewing the N&W application for authority to issue its debentures to Pennsylvania in *N&W Securities*, the Commission noted that the transaction was "part of a program of divestiture to comply with these (merger) condi-

tions'' (328 ICC 885), and reviewed in detail the principal provisions of the agreement and particularly all of the terms of the proposed debentures (328 ICC 885-888). It concluded that the debenture-stock exchange ''should minimize the impact of Pennsylvania's divestiture program on the market price of (N&W's) common stock'' and would thus be ''in the best interest of (N&W) and its security holders'' (328 ICC 891).

That the present suit does not seek to present any new facts, and does not allege that any relevant facts were withheld from the ICC, appears clearly from the thorough consideration to all these matters which the Commission gave in its reports both in *N&W Merger* and *N&W Securities*. It was on this, among other grounds, that both the district court and the court of appeals recognized the suit as an attempt to collaterally attack a decision of the ICC. Both courts concluded that a decision of the Commission can be reviewed only by a three-judge district court pursuant to 28 U.S.C. 2321-25.

ARGUMENT

The decision below is not in any way inconsistent with recent rulings in other federal cases and is, in fact, sustained by clear rulings of this Court.

Where the successful outcome of a collateral suit would, as here, have the practical effect of preventing either one or all of the parties to a transaction—approved by the ICC under Section 5, 20a or both—from implementing that transaction, the courts have without exception applied the clear jurisdictional requirement of the Judicial Code. Specific examples of this are *Venner v. Mich. Cent. R.R. Co.*, 271 U.S. 127, *United States v. Railway Exp. Agency*, 101 F. Supp. 1008 (D. Del. 1951), and *Abramson v. Western Maryland Railway Company*, 142 F. Supp. 694 (E.D. Pa. 1956).

Petitioner contends that this established rule does not apply here because the Commission in approving the issuance of securities under Section 20a of the Act does not, and cannot, determine the adequacy of the consideration the carrier receives for the securities. This contention is contrary to rulings by this Court that the Commission must resolve all issues arising in a Section 20a transaction, whether private or public. In the leading case of *Schwabacher v. United States*, 334 U.S. 182, the opinion observed (334 U.S. at 197):

> "The jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority."

This Court went on to emphasize the sweeping character of the ICC function under both sections by saying that: "In matters within its scope it is the supreme law of the land," and that rights of parties to a transaction before the Commission "must be founded on federal, not on state, law." (334 U.S. at 198)

Contrary to petitioner's argument, this Court in a recent opinion emphasizes that there is no distinction between the scope of Commission responsibility under Section 5 and that under Section 20a. In *Denver and Rio Grande Western R. Co. v. United States,* 387 U.S. 485 at page 493 this Court said:

> "But the foundations of the ICC's obligation under § 5 are largely applicable to § 20a as well. Section 20a, like § 5, must after all be read in the context of overall ICC responsibilities. . . . The responsibility to advance the National Transportation Policy, read into the 'public interest' standard of § 5, is another persistent and overriding duty, equally applicable to § 20a."

With regard to petitioner's contention that the ICC under Section 20a may not determine whether the issuance of securities by a carrier is on fair or adequate terms, this Court has had before it a case in which the Commission's determination on that precise point was challenged. *Breswick & Co. v. United States,* 156 F. Supp. 227 (S.D. N.Y. 1957) was one of a series of related cases in which minority stockholders of Alleghany Corporation sought review of an ICC order under Section 20a authorizing their company to issue preferred stock. That stock, as are the N&W debentures here, was to be issued in exchange for other securities of the carrier at a fixed ratio. One ground of the attack on the ICC order was the contention "that the Commission's findings as to the fairness of the issue are inadequate and are in conflict with undisputed facts" (156 F. Supp. at 229). On this point the three-judge district court held "that the questions so raised were within the range of expert judgment referred to the Commission" (156 F. Supp. at 230). The court nevertheless set aside the ICC order on another ground.

This Court reversed in a *per curiam* order in *Alleghany Corp. v. Breswick & Co.*, 355 U.S. 415. The case was remanded to the three-judge district court for final determination of the sole question whether the ICC's approval of the issuance of preferred stock was in accordance with the Act. On remand the decision of the ICC was upheld. *Breswick & Co. v. United States,* 160 F. Supp. 754 (S.D.N.Y. 1958).

Petitioner here is contending that a federal district court exercising diversity jurisdiction (or a state court, for that matter) may try *de novo* under state law principles a challenge to the basic terms of a security transaction between two railroads, involving over $100,000,000, which has received the express authorization and approval of the ICC under Section 20a. This would be wholly inconsistent with the regulatory scheme established many years ago by Congress. The issue presented is clearly one for the ICC in the first instance, subject only to the regular procedure for the review of Commission orders by a three-judge district court under the Judicial Code, 28 U.S. §§ 2321-25.

Petitioner's argument under the Fifth Amendment to the Constitution approaches frivolity. She contends that the stockholders of N&W should have been given notice of the ICC proceeding under Section 20a. This ignores the fact that stockholders as such are not essential parties to the ICC proceeding. In fact, they are not in any way the real party in interest to this suit. The action is derivative in nature and is brought in the right of N&W itself and not by or for its stockholders themselves. Of course, the N&W had full notice of the ICC proceeding under Section 20a because it initiated that proceeding by filing an application. What petitioner seems to argue is that the due process clause of the Fifth Amendment requires individual notice to the stockholders of a carrier whenever their company files an application with the ICC—apparently on the ground

that one or more of them might oppose the action by their company. There is, of course, no statutory or decisional basis for any such procedure. More significantly, the rights of railroad shareholders are fully preserved by their established right to intervene in ICC proceedings and to seek three-judge court review of ICC orders.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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WILLIAM S. POTTER,
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Attorneys for Pennsylvania Company

October, 1968

SUPREME COURT, U. S.

OCT 15 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 461

FREIDA SUFFIN,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY, THE PENNSYLVANIA COMPANY and NORFOLK AND WESTERN RAILWAY COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT NORFOLK AND WESTERN RAILWAY COMPANY

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IN THE

Supreme Court of the United States

October Term, 1968

No. 461

FREIDA SUFFIN,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY, THE PENNSYLVANIA COMPANY and NORFOLK AND WESTERN RAILWAY COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT NORFOLK AND WESTERN RAILWAY COMPANY

Question Presented

Whether a single judge District Court has jurisdiction to review the fairness of the terms of an issuance of securities by a railroad after the Interstate Commerce Commission (the "ICC") has approved such terms.

Statement

On June 24, 1964, the Interstate Commerce Commission authorized a unification of the Norfolk and Western Railway System by approving the merger into the Norfolk and Western Railway Company (the "N&W") of the New York, Chicago and St. Louis Railroad Company, its purchase of the Sandusky line of the Connecting Railway Company and its acquisition of two small roads. *Norfolk and W. Ry. and New York, C. and St. L. R. Merger,* 324 I.C.C. 1 (1964) ("Merger" decision; 6a*).

As a condition of its approval, the ICC called upon The Pennsylvania Railroad Company and The Pennsylvania Company (collectively the "Pennsylvania"), to divest themselves of their holdings of N&W stock, then amounting to approximately one-third of the amount outstanding, within ten years from the date of consummation of the transactions approved therein and stated:

> "*We shall retain jurisdiction for the purpose, among others, of insuring an orderly divestiture within the 10-year period* or such other period as may hereafter be found necessary for the satisfactory accomplishment thereof." (Emphasis added.) 324 I.C.C. at 48.

In addition, the ICC stated:

> "As an integral part of the divestiture, all management in relationships between the Pennsylvania and Norfolk and Western systems shall be severed within sixty days of the effective date of this order. The

* Numbers in parentheses refer to the Appendix in the Court below; when prefaced by "App.", they refer to the Appendix to the pending Petition for a Writ of Certiorari.

> Pennsylvania is to relinquish or cause to be relinquished any voice which it or its subsidiaries or affiliates may have in the control, operation or management of the Norfolk and Western, and is to cause the resignation from the Board of Directors of the Norfolk and Western any director common or otherwise, representing thereon the interests of the Pennsylvania, as well as the resignation of any officer of the Norfolk and Western elected to represent such interests." 324 I.C.C. at 48.

In furtherance of the ICC divestiture requirement that was accepted by the Pennsylvania, the N&W and the Pennsylvania entered into a memorandum of agreement, dated September 22, 1964, providing that the Pennsylvania would, over a period of ten years, exchange 800,000 shares of N&W common stock for N&W 4⅝ per cent fifteen year convertible subordinated debentures, convertible under certain terms and conditions into N&W stock, by persons other than the Pennsylvania, at a rate of $13,000 principal amount of debentures for each 100 shares of common stock.

While admitting in her complaint that the three "Pennsylvania" directors on the N&W Board (Symes, Bevan and Saunders) resigned on September 16, 1964—a week before the memorandum of agreement (5a)—the petitioner, an N&W stockholder, brought her action derivatively for the alleged benefit of N&W, challenging the memorandum of agreement on the ground that its terms were arrived at in other than arm's-length bargaining because of her claim that the Pennsylvania "dominated and controlled" the N&W (6a).

On or about April 2, 1965, N&W distributed its proxy statement to its stockholders, including petitioner, inform-

ing them that a debenture-for-stock purchase agreement was being prepared as part of the divestiture necessary to accomplish the merger and described the principal terms thereof (16a-18a).

A definitive Exchange Agreement, pursuant to the September 22, 1964 memorandum, was entered into as of December 31, 1965. 328 I.C.C. at 885.

On February 28, 1966, N&W, pursuant to the requirement of Section 20a of the Interstate Commerce Act, applied to the ICC for authority to issue the debentures in exchange for its stock under the terms of the Exchange Agreement. Shortly thereafter and on or about March 23, 1966, N&W via its proxy statement informed its stockholders, including petitioner, of the pending Section 20a application (19a).

On April 13, 1966, the ICC rendered its report and order granting such authority (*Norfolk and Western Ry. Company Securities,* 328 I.C.C. 884 (1966) ("Securities" decision)), wherein it stated:

> "In *Norfolk & W. Ry. Co. and New York, C. and St. L. R. Co. Merger,* 324 I.C.C. 1, the Commission conditioned its approval of the transactions proposed therein and in related proceedings upon, among other things, divestiture by the Pennsylvania Railroad and the Pennsylvania Company, and their subsidiaries and affiliates, of their present and future stockholdings in the applicant within 10 years from the date of consummation thereof. The conditions were accepted and the transactions consummated on October 16, 1964. *As part of a program of divestiture to comply with these conditions,* the Pennsylvania Railroad Company, the

Pennsylvania Company, and the applicant entered into an exchange agreement dated as of December 31, 1965, under which Pennsylvania Company would, within the prescribed 10-year period, exchange 800,000 shares of its Norfolk & Western common stock for $104,000,000 principal amount of applicant's 15-year 4⅝-percent serial subordinated convertible debentures at an exchange rate of $13,000 principal amount of debentures for each 100 shares of common stock." (Emphasis added.) 328 I.C.C. at 885.

As the Court of Appeals stated (App. 5a):

"Even though the complaint alleges that PRR dominated and controlled N&W through stock ownership and an interlocking directorship at the time of the initial 'memorandum of agreement' setting the terms of the challenged exchange (September 22, 1964), the complaint also concedes that all PRR officers and directors had resigned from the N&W Board by September 16, 1964. The record further shows that on October 13, 1964, PRR had deposited all its shares of N&W in three, I.C.C.-approved, independent voting trusts pursuant to the Interstate Commerce Commission (I.C.C.) 'merger' decision of June 24, 1964, which established certain preconditions for a railroad merger, 324 I.C.C. 1, 48-49 (1964). The transaction was approved again by the N&W directors on September 28, 1965 (328 I.C.C. at 885) and the agreement (dated as of December 31, 1965) was submitted for I.C.C. approval on February 28, 1966. The 'securities' decision of April 13, 1966, approving the contemplated exchange, 328 I.C.C. 884 (1966), makes specific reference to the earlier merger decision and to its required PRR divestiture of N&W stock, and we note, as did the District Court, that in its 'merger' decision the I.C.C. explicitly 'retain[ed] jurisdiction for the pur-

pose, among others, of insuring an orderly divestiture within the 10-year period. * * *' " 324 I.C.C. at 48.

Respondents moved to dismiss the complaint on substantially the same grounds, namely, that the District Court lacked jurisdiction of the subject matter of the claim; that the ICC possessed exclusive jurisdiction and issued orders which petitioner herein, in effect, was attempting to review; that petitioner failed to comply with the requirements of Section 1398, and chapter 157, of Title 28 of the United States Code, relating to the enforcement and review of the ICC orders, resulting in an improper tribunal, improper venue and a failure to join the United States as a party (12a-15a).

The District Court granted the motion and the Court of Appeals for the Third Circuit affirmed.

ARGUMENT

POINT I

The Court of Appeals' decision follows applicable decisions.

Much of petitioner's argument is devoted to an issue that was not essential to the decision of either the Court of Appeals or the District Court, namely, the scope of ICC review where only Section 20a is involved. As the Court of Appeals stated:

> "The appellant's statutory argument must be rejected in view of the inter-relationship between the * * * I..C.C. 'merger' and later 'securities' decisions * * *." *Suffin* v. *Pennsylvania R.R.*, 396 F.2d 75, 77 (3d Cir. 1968). (App. 6a-7a; see also, App. 5a n. 1).

Both courts recognized the relationship between the Merger and Securities proceedings and treated the securities as having been issued in a merger context. Petitioner concedes that in a merger context the ICC passes upon what she describes as "private rights" (Petition, 13). She has little alternative in the face of *Denver & Rio Grande W. R.R.* v. *United States,* 387 U. S. 485 (1967) and *Schwabacher* v. *United States,* 334 U. S. 182 (1948).

Petitioner argues that the District Court and Court of Appeals should not have concluded as they did that the Merger and Securities decisions were interrelated (Petition, 7-9). We submit that such conclusion should not be reviewed by this Court under the considerations governing certiorari set forth in Rule 19(b) of the Supreme Court Rules. Certainly, that conclusion is unique to the facts and circumstances of this case and where two courts have already passed upon it, review thereof is unjustified.

The conclusion that the two proceedings were interrelated was proper. The portions of the Merger and Securities decisions set forth in the Statement, *infra,* not only demonstrate their relationship but show that one was anticipated in, and virtually flowed from, the other.

In its Merger decision the ICC anticipated that:

> "As a partial alternative to a secondary distribution of Norfolk & Western stock, it may well be that the Pennsylvania and the Norfolk & Western could reach an agreement providing for annual sales to Norfolk & Western of shares of its stock over a period of years." 324 I.C.C. at 41.

Petitioner's simplistic approach to finances interprets that language as limiting consideration to cash sales. No such limitation is indicated, nor can it be seriously contended that the ICC intended one.

The Merger decision is replete with considerations in depth by the ICC of possible ways and means for the Pennsylvania to dispose of its N&W stock with a minimum impact on its market price, including consideration of the N&W's cash position.

The Securities decision establishes that the ICC did explore in depth the terms and conditions of the actual sale, including whether it was in the public interest as well as in the best interest of N&W and its security holders.

Contrary to the petitioner's contention that the ICC did not consider the merits of the transaction insofar as N&W and its stockholders were concerned, the ICC in its Securities decision expressly stated that the transaction would:

> "* * * minimize the impact of Pennsylvania Company's divestiture program on the market price of applicant's common stock and contribute to the maintenance of its financial and credit standing, all of which is in the public interest *as well as in the best interest of the applicant and its security holders.*" (Emphasis added.) 328 I.C.C. at 891.

Furthermore, even though neither the District Court nor the Court of Appeals considered it necessary to reach the question, the dichotomy between Sections 5 and 20a, argued by the petitioner, is without support.

In the *Denver* case, *supra,* this Court rejected a similar attempt to fragment the Interstate Commerce Act. Mr. Justice Brennan, in delivering the opinion of this Court, stated:

> "* * * [T]he foundations of the ICC's obligation under §5 are largely applicable to §20a as well. Section 20a, like §5, must after all be read in the context of overall ICC responsibilities." 387 U.S. at 493.

Confronted with this clear pronouncement that Section 5, in effect, does apply, petitioner would engraft a limitation on that holding in *Denver* that only anticompetitive effects can be considered along with fiscal manipulation questions under Section 20a. However, this Court in *Denver* said exactly the contrary in holding that "*all* important consequences *including* anticompetitive effects," 387 U.S. at 492 (emphasis added), must be considered by the ICC under Section 20a.

Similarly, contrary to petitioner's contentions, this Court in *Schwabacher, supra,* was as much concerned with Section 20a as with Section 5. There, this Court stated, concerning the questions before it:

> "It is contended that the Commission should not remit the dissenting stockholders to remedies in state courts as the Commission would thereby decline the jurisdiction conferred by Section 5 and Section 20a of the Act." 334 U. S. at 188.

In sustaining such contention, this Court referred to the ICC's determination and again equated the scope of inquiry in regard to the issuance of securities under Section 5 and Section 20a in the following language:

"The Commission, as we have seen, has found that the liabilities asserted by appellant, if settled by litigation or negotiation, will not impair the carrier's ability to perform its service, but it has not found the assumption of such liabilities to be compatible with the public interest under §5 and §20a. Indeed, since these claims exceed what the Commission has found to be just and reasonable, it could hardly find that assumption of such claims would be compatible." *Id.* at 197.

Footnote 15 to this Court's decision in *Schwabacher* (at page 195) reads in part as follows:

"Repeated recommendations of the Commission that the federal government occupy the field of regulation of railroad security issues and assumption of obligations were followed in 1920 by addition of §20a to the Interstate Commerce Act (§439 of the Transportation Act of 1920, 41 Stat. 494).

"As early as 1907 the Commission has stated that 'the time has come when some reasonable regulation should be imposed upon the issuance of securities by railways engaged in interstate commerce.' 12 I.C.C. 277, 306. This recommendation was renewed in the Commission's annual report for 1907, p. 24 and in every succeeding annual report up to and including 1919. The Commission incorporated in the 1919 report the statement concerning recommended legislation it had submitted to the Senate Interstate Commerce Committee, which included a recommendation for regulation of security issues.

"House Report No. 456, 66th Cong., 1st Sess. (November 10, 1919), said with respect to the section which later became §20a: '* * * The enactment of the pending bill *will put the control over stock and bond issues exclusively in the hands of the Federal Government* and will result in uniformity and greater promptness of action.'

> "Section 20a as enacted in 1920 remained unchanged by the Transportation Act of 1940. * * *" (Emphasis added.)

Thus, petitioner can find no solace in the *Schwabacher* case to support the dichotomy, of her own creation, regarding Section 20a and Section 5; her attempt to dismiss that case and the *Denver* case as being merger cases (Petition, 13) does not hold up under analysis, and it is clear that petitioner's attempt at separating Section 5 and Section 20a is without merit.

Petitioner places great reliance on *Otis & Co.* v. *Pennsylvania R.R.*, 61 F. Supp. 905 (E.D. Pa. 1945), *aff'd* 155 F.2d 522 (3d Cir. 1946).

As stated by the District Court in the case at bar:

> "Nor does *Otis & Co.* v. *Pennsylvania R.R.*, * * * relied upon by plaintiff dictate a contrary result. While it is true that in that case Judge Kalodner concluded that a Federal District Court might, under certain circumstances, properly have jurisdiction to determine the private rights of stockholders which the ICC cannot determine, he clearly envisioned a situation where, unlike the instant case, the liability sought to be imposed was against a group of directors for breach of their fiduciary duties. Furthermore, again unlike the present suit, *Otis* involved the issuance of railroad securities in a non-merger context and is thus, inapposite in a situation where the securities in question are an indispensable by-product of a railroad merger." 276 F. Supp. at 554.

The Court of Appeals stated that "the District Court was entirely correct in concluding that *Otis* * * * was inapposite and did not govern this case. * * *" (App. 7a)

Otis involved a motion for summary judgment, which the court there decided in favor of the defendant directors on the basis that even though the transaction may not have been the best one possible, the board of directors properly exercised their business judgment and were in no way negligent. The only principle for which *Otis* has ever been cited is the business judgment rule.

Unlike *Otis,* the case at bar, as we have shown, involves an assault on two orders of the ICC.

The consequence of adjudication by the District Court in favor of petitioner would have been a complete rearrangement of the plan for stock-debenture exchange approved by the ICC. Damages could have been established only by having the District Court substitute its judgment for that of the ICC as to what was the proper exchange ratio. A judgment that Pennsylvania must pay damages to N&W amounting to the difference between the ratio set by the ICC and a ratio found proper by the Court would have constituted for all practical purposes a reversal of the ICC order.

Petitioner also cites *Pittsburgh & West Virginia Ry.* v. *United States,* 281 U.S. 479 (1930), in support of her position. There, the complainant was a railroad that owned a minority stock interest in another railroad that had obtained ICC approval to abandon a passenger terminal and became a lessee in a joint passenger terminal to be established in Cleveland, Ohio. This Court held that the complainant lacked standing to challenge the ICC order "in the absence of resulting actual or threatened injury to

it." (*Id.* at 486) It also stated that allegations aimed at the actions of the directors of the railroad were "not properly joined in this suit." (*Id.* at 488) The factual differences between that case and the one at bar are obvious, and to the extent that petitioner finds in that case support for the proposition that a single Judge District Court has jurisdiction to modify an ICC order, she errs. Petitioner similarly errs in her reference to *New York Central Securities Co.* v. *United States,* 287 U. S. 12 (1932). While the language of those decisions may be ambiguous, they can not be read to confer such jurisdiction upon a single Judge District Court and still remain consistent with the Interstate Commerce Act and the cases decided thereunder, *Schwabacher, Denver* and others; even *Otis* did not suggest such a result.

Finally, petitioner's attempt to support her fragmentation of the Interstate Commerce Act by citing *County of Marin* v. *United States,* 356 U. S. 412 (1948) merely underlines the necessity for recognizing the obvious relationship between the Merger and Securities decisions.

In *Marin* a motor carrier was attempting to spin off one of its lines in order to reduce local taxation of it. Petitioner in the case at bar argues that the Securities decision is the same thing, and because this Court in *Marin* said the situation there was not a merger and that, accordingly, the ICC did not have jurisdiction under Section 5, the same finding should prevail in the case at bar.

In addition to the fact that the *Denver* and *Schwabacher* cases show that Section 20a jurisdiction is sufficient to permit the ICC to review the points raised by the petitioner

(Section 20a was not involved in *Marin*), the situations in *Marin* and the case at bar are so different that it would require a flight from reality to equate them. That is exactly what petitioner is suggesting: this Court should ignore the fact that the Securities decision flowed from the Merger decision and, in fact, ignore the existence of that Merger decision, and apply a rule of law enunciated in a motor carrier spin-off case where Section 20a was not even involved. It is submitted that the mere statement of such a proposition demolishes it.

POINT II

The decision of the Court of Appeals does not conflict with the Fifth Amendment to the Constitution.

Petitioner attempts to fashion a Constitutional question to justify review by this Court by stating that "the carrier's stockholder's * * * were not given notice of the hearing of the proposed securities issuance." (Petition, 2).

Section 20a(6) confers discretion on the ICC as to whether it shall hold a hearing on an application to issue securities and that a hearing is not statutorily required on such an application has been recognized by the courts, including this one. See *e.g., Alleghany Corp.* v. *Breswick & Co.,* 353 U.S. 151, 175 (1957); *Chicago South Shore & South Bend R.R.* v. *United States,* 221 F. Supp. 106, 110 (N.D.Ind. 1963); *Walker* v. *United States,* 208 F. Supp. 388, 394 (W.D. Tex. 1962), *aff'd,* 372 U.S. 526 (1963).

Since a hearing is not statutorily required in an ICC proceeding, the Administrative Procedure Act, is inap-

plicable. *A. L. Root Transportation, Inc.* v. *United States,* 280 F. Supp. 152, 157 (D. Vt. 1968); see *Wong Yang Sung* v. *McGrath,* 339 U.S. 33 (1950).

The cases cited by petitioner are clearly inapposite to the case at bar. They set forth the procedures for satisfying constitutional requirements where hearings are either compulsory or are actually held regardless of whether they were required, and there is nothing in the Securities decision about a hearing for the simple reason that a hearing was neither required nor held.

In *Ohio Bell Telephone Co.* v. *Commission,* 301 U.S. 292 (1937) (Petition, 16, 17), the Public Utilities Commission of Ohio revised the petitioner's rates. In so doing the Commission ignored the evidence submitted to it and relied instead on what this Court described as a secret search of its own, the nature of which was not revealed. This Court pointed out that the petitioner there had no notice that the Commission would proceed in that manner, and that therefore it had no real opportunity to argue its case and accordingly held such hearing did not satisfy due process requirements.

Thus, the question raised by *Ohio Bell* was whether the practices and procedures followed in a particular hearing were constitutional, and that distinction applies equally to all of the cases cited by this Court in the passage from *Ohio Bell* quoted on page 17 of the Petition. The courts in those cases did not consider the question of whether in all administrative determinations a person is entitled to a hearing, but rather considered the question of whether a particular hearing was fair.

Another important distinction between *Ohio Bell* and the cases cited therein and the instant case is that in those cases the person complaining of the denial of due process was a party and the very subject of the administrative proceedings. In the case at bar, the N&W, not the petitioner, was the party to the administrative proceeding.

The same distinctions are present in the four cases cited by petitioner on page 17 of her petition as being in accord with *Ohio Bell.*

In any event, as pointed out by both the District Court (276 F. Supp. at 554) and the Court of Appeals (396 F.2d at 77, n.4) petitioner and all other N&W stockholders were given notice of N&W's application to the ICC. While petitioner struggles to minimize the extent of the information furnished, it is clear that the proxy statements set forth all of the material terms of the transaction and the necessity for application to the ICC (16a18a, 19a). While, as also pointed out by both the District Court (*ibid.*) and the Court of Appeals (*ibid.*), the petitioner could have intervened in the ICC proceeding, and could have requested a hearing, she chose to ignore the notices and do nothing. See generally, *United States* v. *Illinois Central R.R.,* 291 U.S. 457, 460-464, 465 (1934); *Chicago South Shore & South Bend R.R.,* 221 F. Supp. 106, 100 (N.D.Ind. 1963).

As stated in *Oscar Gruss & Sons* v. *United States,* 261 F. Supp. 386 (S.D.N.Y. 1966), *vacated on other grounds,* 386 U.S. 776 (1967):

> "There is indeed authority * * * that an administrative agency may consider a stockholder as speaking on behalf of a corporation if it finds that the corpora-

tion has been prevented from doing so by another stockholder's abuse of power." 261 F. Supp. at 393.

A mere reading of the notices received by petitioner (16a-18a, 19a) refutes their characterization as "oblique, casual and uninformative" (Petition, 18); the tortured reasoning involving petitioner's "hypothetically sophisticated reader of proxy statements" (Petition, 15-16) falls of its own weight. Any complaint that petitioner had with the transaction could and should have been raised in the ICC proceeding. She chose to do absolutely nothing in that proper forum and that decision does not confer jurisdiction on a single Judge District Court to substitute its judgment for the judgment of the ICC to vary or modify the terms of one of its orders. Two courts have agreed with that conclusion, and it is submitted that neither the record nor the applicable law justifies further review.

Conclusion

Petitioner has not advanced any justification for granting the writ and certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 461

FRIEDA SUFFIN, PETITIONER

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of November 12, 1968, inviting the Solicitor General to express the views of the United States. The Interstate Commerce Commission concurs in this memorandum.

STATEMENT

This is a derivative action by a stockholder of the Norfolk and Western Railway Company (N&W), seeking damages for alleged unfairness to N&W in the terms of an exchange of securities whereby the former Pennsylvania Railroad Company and a subsidiary thereof (together, Pennsylvania) divested themselves of N&W common stock in return for newly

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issued N&W debentures. The divestiture was ordered by the Interstate Commerce Commission in 1964 as a condition of its approval of N&W's acquisition of five railroads under Section 5 of the Interstate Commerce Act, 49 U.S.C. 5 (324 I.C.C. 1, 32–49). In 1966, in a proceeding under Section 20a of the Act, 49 U.S.C. 20a, the Commission authorized N&W to accomplish the divestiture by issuing the debentures here in question (328 I.C.C. 884).

The district court dismissed the complaint for lack of jurisdiction, holding that the terms of a securities exchange found just and reasonable by the Commission may not be attacked subsequently in a court action other than a three-judge court review proceeding. (276 F. Supp. 549, 553). The court of appeals affirmed *per curiam,* largely on the basis of the district court opinion (396 F. 2d 75).

DISCUSSION

1. As the plaintiff in a derivative action, petitioner does not, of course, assert any claim in her own right either against Pennsylvania or against the management of N&W. Rather, her claim is fundamentally that N&W is entitled to relief against Pennsylvania on the ground that the terms of the debenture transaction were allegedly unfair to N&W.

The Commission, in its proceeding under Section 20a, fully examined and evaluated the terms of the debenture transaction that petitioner questions, concluding, in the language of Section 20a(2) that the issue was "for a lawful object * * * compatible with the public interest * * * and * * * reasonably neces-

sary and appropriate for such purpose" (328 I.C.C. at 893). It found that the conversion price of the debentures was virtually the same as the then current price of N&W stock, and noted the improved net-earnings position which N&W claimed would result from the substantial tax benefits to the company through the debenture-for-stock exchange (328 I.C.C. at 888, 890–891). It expressed the view that the debenture exchange proposal—

> * * * should minimize the impact of Pennsylvania Company's divestiture program on the market price of applicant's [N&W's] common stock and contribute to the maintenance of its financial and credit standing, all of which is in the public interest *as well as in the best interest of the applicant and its security holders* [328 I.C.C. at 891, emphasis added].[1]

In our view, Section 20a, by requiring findings that the debenture issue in question is for "a lawful object * * * compatible with the public interest" and "reasonably necessary and appropriate for such purpose", called upon the Commission in this case to determine, as it did, that the terms were not detrimental to N&W as the issuer. This is so especially because the issue was an essential element in the merger ap-

[1] In the Section 5 proceeding the Commission had expressed concern lest the disposition of such a large block of N&W stock upset the market (with resulting adverse impact upon N&W stockholders) and suggested annual sales of the stock to N&W as an alternative to a secondary offering (324 I.C.C. at 40–41, 46). The Commission ordered that the divestiture take place over a ten-year period, during which it would retain jurisdiction to ensure that "orderly divestiture" was accomplished (324 I.C.C. at 46, 48).

proved in the Section 5 proceeding, as to which the Commission had the obligation to "pass upon and approve all capital liabilities which the merged company will assume or discharge as a result of merger." *Schwabacher* v. *United States,* 334 U.S. 182, 198. And the requirement that the Commission consider the fairness of the debenture terms precludes collateral consideration of that question subsequently in another forum, since all pertinent "rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable." *Id.* at 201. As the Court pointed out in *Schwabacher,* "the jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority." *Id.* at 197.[2]

Ordinarily, applications for authority to merge under Section 5 and to issue necessary securities under Section 20a are simultaneously filed and are consolidated for all purposes. If the merger is ultimately approved, the Commission authorizes the requisite stock issuance at the same time.[3] Here, however, the situation presented made a separate Section 20a proceeding appropriate after the terms of the divestiture required in the Section 5 order were

[2] Section 20a(7) provides: "The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein" (49 U.S.C. 20a(7)).

[3] *E.g., Pennsylvania Railroad Company-Merger-New York Central Railroad Company,* 327 I.C.C. 475.

worked out. But the separation of the two proceedings in time did not affect the applicability of the principles of *Schwabacher*—either with respect to the Commission's obligations to evaluate the debenture issue or with respect to the effect of that evaluation on private claims.[4]

Petitioner could have asserted her objections to the debenture issue in the Section 20a proceeding in which the Commission approved it. Moreover, it was open to her to seek judicial review of the Commission's decision in the normal manner. See *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 159–160. For the reasons stated, she may not, however, litigate the fairness of the debenture issue collaterally in the present derivative action, and the district court properly dismissed this complaint for lack of jurisdiction.

2. Petitioner further appears to contend that her derivative claim should not be barred by the Commission's action because the Commission did not give her and the other stockholders of N&W specific notice of the Section 20a proceeding. She does not, however,

[4] Petitioner's reliance upon *New York Central Securities Corp.* v. *United States*, 387 U.S. 12, and *Pittsburgh & W. Va. Ry.* v. *United States* 281 U.S. 479, is misplaced. If the former case, involving a proceeding under Sections 5 and 20a, stands for the proposition that questions concerning the fairness of an indenture to minority stockholders cannot be determined by the Commission in such proceedings (a proposition that is not altogether clear from the opinion), then it is overruled by *Schwabacher*. The *Pittsburgh* case did not relate to either a merger or an issuance of securities; the Court merely held that a minority stockholder could not raise, in a three-judge court reviewing the grant of certificates of public convenience and necessity, the claim that the actions approved by the Commission were improperly taken as an internal corporate matter.

contend that the Commission failed to follow the notice requirements specified in Section 20a. She conceded in the district court that the Section 5 notice provisions are "adequate and do not violate due process" (276 F. Supp. at 554 n. 9), and in fact she would have been entitled to no more notice than was given had the Section 5 and Section 20a proceedings been held concurrently. In any event, as a derivative plaintiff she stands in the corporation's shoes and cannot complain that personal notice to her is required for the corporation to be bound by a proceeding in which it participated. Finally, both the district court (276 F. Supp. at 554) and the court of appeals (396 F. 2d at 77 n. 4) found that petitioner had received adequate actual notice by virtue of N&W's proxy statements.

CONCLUSION

For the foregoing reasons, we believe that the result reached by the courts below was correct. This case involves unique circumstances. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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THE PENNSYLVANIA RAILROAD COMPANY, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S BRIEF IN RESPONSE TO THE SOLICITOR GENERAL

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IN THE

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October Term, 1968

No. 461

FRIEDA SUFFIN,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*

PETITIONER'S BRIEF IN RESPONSE TO THE SOLICITOR GENERAL

1. Contrary to the Solicitor General's assertion (Br. 6), nothing in the relevant circumstances of this case is "unique". The ICC's 1966 decision (328 ICC 884) approved the issuance of the N&W debentures pursuant to § 20a. It made the required finding that the transaction was "compatible with the public interest" (p. 893); but it made no finding of "just and reasonable"; and it made no reference to § 5(2).* The case thus squarely presents the question whether a § 20a order precludes the stockholders of a carrier from suing its fiduciaries for breach of their duty in connection with the transaction. The broad importance

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* The difference between the "public interest" standard and the "just and reasonable" standard is recognized in *Schwabacher* v. *U.S.*, 334 U.S. 182, 198-9 (1948):

> "Apart from meeting the test of the public interest, the merger terms, as to stockholders, must be found to be just and reasonable."

of this question of statutory interpretation does not require elaboration.

2. The Solicitor General in effect recognizes (Br. 5 fn.) that *New York Central Sec. Corp.* v. *U. S.*, 287 U.S. 12, 28-29 (1932), sustains the stockholders' right of action; but he maintains that the case has been overruled by *Schwabacher* v. *U.S.*, 334 U.S. 182 (1948). In fact, however, this Court's opinion in *Schwabacher* did not mention *New York Central,* although that case was cited in the briefs (see 92 L. Ed. at 1307) and in the dissenting opinion (334 U.S. at 209). The inference is strong that the *Schwabacher* Court saw no conflict between its decision and *New York Central.*

In any event, we submit, the vitality or demise of *New York Central* needs clarification by this Court, not only in the interest of the present case, but for the future guidance of the Commission (which should be told the scope of its review under § 20a), of the lower courts, and of all aggrieved carrier shareholders, who ought to know whether to seek relief against wrongdoing fiduciaries in a three judge court (with direct review by this Court) or by plenary action—or, for that matter, whether the fiduciaries enjoy complete immunity.

3. The Solicitor General misreads the record in essential respects.

(a) He states that the debenture issue "was an essential element in the merger approved in the Section 5 proceeding" (Br. 3-4; see also 1-2). Actually the ICC's merger decision of 1964 (324 ICC 1) did not so much as mention the issuance of debentures. That idea was not born until later (Pet. 3) and was not submitted to the ICC until 1966, long after consummation of the merger. The debenture transaction was thus approved under § 20a, not under § 5.

(b) The Solicitor General also errs in stating (Br. 2) that the ICC "fully examined and evaluated the terms of the debenture transaction". Apart from a reference to the market prices of the N&W stock (328 ICC at 888), the ICC gave no consideration whatever to the economic impact of the convertibility of the debentures.

(c) The Solicitor General quotes (Br. 3) the ICC as holding that the debenture exchange was "in the best interest of the applicant and its security holders". Actually, however, the quoted language (328 ICC at 891), read in context, merely expressed the Commission's view that it was desirable for N&W to buy its own shares from Pennsylvania in order to keep them from being thrown on the market; it had nothing to do with the fairness of the convertible debentures to be issued in exchange for the stock.

4. The Solicitor General contends (Br. 4-5) that, despite the separation in time of the 1964 and 1966 proceedings, the *Schwabacher* doctrine applied to the § 20a order of 1966. The contention is unfounded.

Schwabacher deals with mergers and other acquisitions under § 5; it is in that context that the ICC must determine "whether each class of stockholder receives an equivalent of what it turns in", and must "see that minority interests are protected" (334 U.S. at 201). The 1966 proceedings involved no merger or acquisition but, on the contrary, a step in the corporate divorce of N&W from Pennsylvania; hence, there was no room for the application either of § 5 or of the *Schwabacher* rule. See *County of Marin* v. *U.S.*, 356 U.S. 412 (1958), which the Solicitor General ignores. Indeed, even if the two proceedings had occurred at the same time, we seriously doubt that the accident of simul-

taneity would have operated to extend merger principles to a transaction which essentially was the opposite of a merger.

5. According to the Solicitor General (Br. 5), petitioner should have raised her objections in the § 20a proceedings before the ICC. This would have been rather difficult since —still according to the Solicitor General (Br. 5-6)—petitioner was not entitled to notice of the proceedings. In fact, as we have shown (Pet. 14-18), petitioner did not receive any notice worth that name.

The Solicitor General refers to petitioner's concession that the § 5 notice provisions are adequate and do not violate due process; he asserts that petitioner would have been entitled to no more notice than was given if the § 5 and § 20a proceedings had been held concurrently (Br. 6). The argument overlooks that, in § 5 proceedings, the ICC must "afford reasonable opportunity for interested parties to be heard"; § 5(2)(b). An opportunity to be heard would be meaningless without effective notice; *Mullane* v. *Central Hanover B. & T. Co.*, 339 U.S. 306, 314-5 (1950). Since the N&W debentures were convertible into common stock, the threatened dilution of the common would have given petitioner standing as an "interested party" under § 5(2)(b); *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 159-160 (1957). Consequently, had the proceeding been under § 5, petitioner would have been entitled to notice.

§ 20a, in contrast to § 5, contains no provision for the hearing of interested parties or for notice to them. Under constitutional due process, the rights of interested parties cannot be cut off without notice and hearing; *Mullane, supra.* The omission of any notice provision from § 20a is, there-

fore, compelling evidence that a § 20a order does not deprive aggrieved shareholders of their common law rights against wrongdoing fiduciaries.

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